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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 PERFECT 10, INC., a California corporation

11 Plaintiff,

12 vs.

13 RAPIDSHARE A.G., a corporation,
14 CHRISTIAN SCHMID; BOBBY CHANG;
and DOES 1 through 100, inclusive

15 Defendants.
16

CASE NO. 09 CV 2596 H (WMC)

**DECLARATION OF LORI CHANG IN
SUPPORT OF THE JOINT *EX PARTE*
MOTION TO VACATE PRIOR RULING
IN FURTHERANCE OF THE
SETTLEMENT AGREEMENT**

CTRM: 13

JUDGE: Hon. Marilyn L. Huff

DATE FILED: November 18, 2009

TRIAL DATE: None Set

17
18 AND RELATED COUNTERCLAIMS
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DECLARATION OF LORI CHANG

I, Lori Chang, declare:

1. I am an attorney admitted to practice in California and before this court. I am n associate in the law firm of Greenberg Traurig LLP ("GT"), counsel of record for defendant and counterclaimant RapidShare AG ("RapidShare"). I have personal knowledge of the following facts and would competently testify thereto if called as a witness.

2. On May 12, 2010, the Court entered the Order Re: (1) Granting In Part And Denying In Part Defendants' Motion To Dismiss For Lack Of Personal Jurisdiction; And (2) Denying Defendants' Motion To Dismiss For Forum Non Conveniens (Doc. No. 60) (the "Jurisdiction Order"), in which the Court dismissed the claims against Christian Schmid and Bobby Chang for lack of personal jurisdiction, but denied the motion as to RapidShare, and further denied the motion to dismiss for *forum non conveniens*. Attached as Exhibit A is a true and correct copy of the Jurisdiction Order.

3. RapidShare and Perfect 10, Inc. (collectively, the "Parties") have reached a confidential settlement agreement. The Parties' joint request to vacate the Court's prior ruling that RapidShare is subject to personal jurisdiction, as set forth in the Jurisdiction Order, is a condition of the settlement. The Parties do not seek vacatur of the Court's other rulings contained in the Jurisdiction Order, which granted dismissal in favor of Christian Schmid and Bobby Chang for lack of personal jurisdiction, and denied the *forum non conveniens* motion.

4. The Parties have also agreed to seek a stay of all proceedings pending entry of a ruling on the joint *ex parte* motion.

5. The settlement agreement was reached while RapidShare's partial summary judgment motion (Doc. No. 79), filed on June 11, 2010, was pending before the Court. RapidShare's motion was withdrawn and taken off calendar as a result of the Parties' settlement.

6. Had this lawsuit proceeded, RapidShare would have appealed the Court's ruling that RapidShare is subject to personal jurisdiction and the findings that RapidShare purposefully availed itself of the forum and that the claims arose from forum contacts.

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct and that this Declaration was executed this 22nd day of July, 2010 at Santa
3 Monica, California.
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6 /s Lori Chang

LORI CHANG
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INDEX OF EXHIBIT

<u>Ex.</u>	<u>Description</u>
A.	05/12/20101 Order (1) Granting in Part and Denying in Part Defendants' Motion to Dismiss for Lack of Personal Jurisdiction; and (2) Denying Defendants' Motion to Dismiss for Forum Non Conveniens

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 PERFECT 10, INC., a California
12 corporation,

Plaintiff,

13 vs.
14

15
16 RAPIDSHARE AG., a corporation;
17 CHRISTIAN SCHMID; BOBBY
18 CHANG; and DOES 1 through 100,
inclusive,

Defendants.

CASE NO. 09-CV-2596 H (WMC)

ORDER:

**(1) GRANTING IN PART AND
DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS FOR LACK OF
PERSONAL JURISDICTION;
AND**

**(2) DENYING DEFENDANTS'
MOTION TO DISMISS FOR
FORUM NON CONVENIENS**

19 On November 18, 2009, Perfect 10, Inc. ("Plaintiff") filed a complaint against
20 RapidShare AG ("RapidShare"), Christian Schmid ("Schmid"), and Bobby Chang ("Chang,"
21 together "Defendants"). (Doc. No. 1.) Plaintiff's complaint alleges causes of action for
22 copyright infringement, trademark infringement, trademark dilution, violation of 15 U.S.C. §
23 1125, violation of California's Unfair Competition Law, violation of rights of publicity, unjust
24 enrichment, and constrictive trust. (*Id.*) On March 23, 2010, Defendants filed a motion to
25 dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2)
26 and a motion to dismiss for forum non conveniens. (Doc. Nos. 6 & 7.) On April 13, 2010,
27 Plaintiff filed a response in opposition to each motion to dismiss. (Doc. Nos. 14 & 15.) On
28

1 May 4, 2010, Defendants filed a reply in support of their motion to dismiss for lack of personal
2 jurisdiction. (Doc. No. 36.) On May 5, 2010, Defendants filed a reply in support of their
3 motion to dismiss for forum non conveniens. (Doc. No. 37.)

4 The Court held a hearing where the parties addressed Defendants' motions to dismiss
5 on May 12, 2010 at 1:30 p.m. in courtroom 13. Eric Benink and Jeffrey Mausner appeared on
6 behalf of Plaintiff and Ian Ballon and Lori Chang appeared on behalf of Defendants. For the
7 reasons set forth below, the Court grants in part and denies in part Defendants' motion to
8 dismiss for lack of personal jurisdiction and denies Defendants' motion to dismiss for forum
9 non conveniens.

10 **BACKGROUND**

11 Plaintiff Perfect 10, Inc. is a California corporation that owns and operates the internet
12 website located at perfect10.com. (Doc. No. 1 ¶ 4.) Plaintiff's business consists of the design,
13 creation, production, promotion, and sale of adult entertainment products, including
14 photographs, videos, magazines, cell phone downloads, and other media. (*Id.* ¶ 9.) Plaintiff's
15 website, perfect10.com, provides users access to content owned by Plaintiff for a membership
16 fee of \$25.50 per month. (*Id.* ¶ 12.) Plaintiff alleges that it owns thousands of copyrighted
17 photographs and video productions as well as its Perfect 10 trademarks. (*Id.* ¶ 14-15.)

18 Defendant RapidShare is a Swiss company with its headquarters and sole place of
19 business in Cham, Switzerland. (Doc. No. 6-18 Ex. B ("Chang Decl.") ¶ 10.) RapidShare has
20 approximately fifty staff members, none of whom reside or are domiciled in the United States.
21 (*Id.*) RapidShare provides a file-hosting service, which it analogizes to "an online storage
22 locker." (Doc. No. 6-2 ("Pfaff Decl.") ¶ 4.) RapidShare offers both free and paid, premium
23 file-hosting services. (Doc. No. 26-5 ("4/29 Schmid Decl.") ¶ 22.) Among other benefits,
24 paying premium-account users receive guaranteed file space. (*Id.*) RapidShare sells a thirty-
25 day premium membership from its website, rapidshare.com, for 6.99 Euros. (*See* Pfaff Decl.
26 Ex. B.) Using either RapidShare's free or premium service, users can upload files from their
27 hard drives or other remote locations onto RapidShare's servers, which are located in
28 Germany. (Pfaff Decl. ¶ 7; 4/29 Schmid Decl. ¶ 22.) The servers automatically generate a

1 unique download link (a URL) for each uploaded file. (Pfaff Decl. ¶ 7.) The user can then
2 share his unique download link with third parties who can use the link to access and download
3 the user's uploaded file. (See id.)

4 Defendant Bobby Chang is the Geschaefstfuehrer of RapidShare, which is the German
5 equivalent of a CEO. (Chang Decl. ¶ 1.) Chang is a German citizen and a resident of
6 Switzerland. (Id. ¶ 3.) Defendant Christian Schmid is RapidShare's
7 Verwaltungsratspraesident, which is a role similar to president of a board of directors. (Doc.
8 No. 6-18 Ex. A ("Schmid Decl.") ¶ 1.) Schmid is a German citizen and a resident of
9 Switzerland. (Id. ¶ 3.) Plaintiff alleges that RapidShare, Schmid, and Chang own, operate, and
10 control the Internet websites located at rapidshare.de and rapidshare.com. (Doc. No. 1. ¶ 5.)

11 Plaintiff's complaint alleges that Defendants knowingly engage in and facilitate ongoing
12 violations of Plaintiff's rights to its copyrighted materials and trademarks, and its rights of
13 publicity. (Id. ¶ 21.)

14 DISCUSSION

15 **I. Personal Jurisdiction**

16 **A. Legal Standard**

17 When a defendant moves to dismiss under Rule 12(b)(2), the plaintiff bears the burden
18 of demonstrating that the court may properly exercise personal jurisdiction over the defendant.
19 Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). Absent formal discovery
20 or an evidentiary hearing, a plaintiff need make only a prima facie showing that jurisdiction
21 exists to survive a Rule 12(b)(2) motion to dismiss. See id. "Although the plaintiff cannot
22 simply rest on the bare allegations of its complaint, uncontroverted allegations in the complaint
23 must be taken as true. Conflicts between parties over statements contained in affidavits must
24 be resolved in the plaintiff's favor." Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797,
25 800 (9th Cir. 2004) (quotation marks and citations omitted).

26 "The general rule is that personal jurisdiction over a defendant is proper if it is
27 permitted by a long-arm statute and if the exercise of that jurisdiction does not violate federal
28 due process." Pebble Beach, 453 F.3d at 1154. Because California authorizes jurisdiction to

1 the full extent permitted by the Constitution, see Cal. Civ. Proc. Code § 410.10, the relevant
2 inquiry is whether the exercise of jurisdiction over Defendants would be consistent with due
3 process. See Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122,
4 1129 (9th Cir. 2003).

5 The Fourteenth Amendment's Due Process Clause permits courts to exercise personal
6 jurisdiction over any defendant who has sufficient "minimum contacts" with the forum that the
7 "maintenance of the suit does not offend traditional notions of fair play and substantial
8 justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). There are two recognized
9 bases for exercising personal jurisdiction over a non-resident defendant: (1) "general
10 jurisdiction," which arises where a defendant's activities in the forum state are sufficiently
11 "substantial" or "continuous and systematic" to justify the exercise of jurisdiction over him in
12 all matters; and (2) "specific jurisdiction," which arises when a defendant's specific contacts
13 with the forum give rise to the claim in question. See Helicopteros Nacionales de Colombia
14 S.A. v. Hall, 466 U.S. 408, 414-16 (1984). Here, Plaintiff argues that the Court has specific
15 jurisdiction over Defendants.¹ (Doc. No. 14.)

16 The Ninth Circuit applies a three-prong test to determine whether a court may exercise
17 specific jurisdiction over a defendant:

- 18 (1) [t]he non-resident defendant must purposefully direct his activities or
19 consummate some transaction with the forum or resident thereof; or perform
20 some act by which he purposefully avails himself of the privilege of conducting
21 activities in the forum, thereby invoking the benefits and protections of its laws;
22 (2) the claim must be one which arises out of or relates to the defendant's
23

24
25 ¹Plaintiff also argues that the Court may exercise federal long-arm jurisdiction pursuant
26 to Federal Rule of Civil Procedure 4(k)(2). (Doc. No. 14 at 19-20.) Rule 4(k)(2) provides that
27 "[f]or a claim that arises under federal law, serving a summons or filing a waiver of service
28 establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to
jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is
consistent with the United States Constitution and laws." Since the Court determines that
RapidShare is subject to jurisdiction in California, the Court concludes that it is unnecessary
to assess jurisdiction pursuant to Rule 4(k)(2).

1 forum-related activities; and (3) the exercise of jurisdiction must comport with
2 fair play and substantial justice.

3 Schwarzenegger, 374 F.3d at 802. The plaintiff bears the burden of establishing that the first
4 two prongs of the test are satisfied. Id. at 802. "If the plaintiff succeeds in satisfying both of
5 the first two prongs, the burden then shifts to the defendant to 'present a compelling case' that
6 the exercise of jurisdiction would not be reasonable." Id. (citing Burger King Corp. v.
7 Rudzewicz, 471 U.S. 462, 476-78 (1985)).

8 **B. Personal Jurisdiction Over RapidShare**

9 **1. Purposeful Availment**

10 A defendant purposefully avails himself of a forum "if the defendant has taken
11 deliberate action within the forum state or if he has created continuing obligations to forum
12 residents. It is not required that a defendant be physically present within, or have physical
13 contacts with, the forum, provided that his efforts are purposefully directed toward forum
14 residents." Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 417 (9th Cir. 1997) (citing Ballard
15 v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995)). In the context of internet-based activities, the
16 Ninth Circuit has "discussed with approval a sliding scale analysis that looks to how
17 interactive an Internet website is for purposes of determining its jurisdictional effect."
18 Boschetto v. Hansing, 539 F.3d 1011, 1018 (9th Cir. 2008) (citing Cybersell, 130 F.3d 414).
19 The court in American Automobile Association, Inc. v. Darba Enterprises, Inc., No. C 09-
20 00510, 2009 WL 1066506, *4 (N.D. Cal. Apr. 21, 2009) summarized this "sliding scale"
21 approach:

22 At one end of the scale are "passive" websites which merely display
23 information, such as an advertisement. See [Stomp, Inc. v. NeatO, LLC], 61 F.
24 Supp. 2d 1074, 1078 (C.D. Cal. 1999). Personal jurisdiction is "not appropriate
25 when a website is merely . . . passive." Id. At the other end of the scale are
26 "interactive" websites which function for commercial purposes and where users
27 exchange information. See [Cybersell], 130 F.3d at 418]. Personal jurisdiction
28 is appropriate "when an entity is conducting business over the internet." Stomp,

1 Inc., 61 F. Supp. 2d at 1078. Where a website is somewhere between the two
2 extremes, “the likelihood that personal jurisdiction can be constitutionally
3 exercised is directly proportionate to the nature and quality of commercial
4 activity that an entity conducts over the internet.” Cybersell, 130 F.3d at 419.

5 RapidShare operates a highly interactive website. The company, through its website,
6 sells users monthly and annual subscriptions to its file-hosting service. (See Pfaff Decl. Ex.
7 B.) RapidShare does not dispute that it has paying customers in California. (See Doc. Nos.
8 6 & 36.) Additionally, it is undisputed that California residents utilize RapidShare’s file-
9 hosting service to upload materials onto RapidShare’s servers and to download materials that
10 are available on RapidShare’s servers. Plaintiff has presented evidence that RapidShare
11 receives over 40 million visitors per day, that it is the twelfth most visited website on the
12 Internet, and that the company makes approximately \$80 million in yearly revenue. (Doc. No.
13 14-3 (“Zada Decl.”) ¶ 7, Ex. 4.) Based on this information, Plaintiff argues that thousands of
14 persons in California must utilize RapidShare’s services. (Doc. No. 14 at 14.) Defendants
15 concede that “RapidShare presumes that some of its users may be California residents.” (Doc.
16 No. 6-1 at 12 n.7.)

17 Notwithstanding the California users of RapidShare, Defendants argue that “the
18 ‘contacts’ that give rise to Perfect 10’s complaint are based on the alleged conduct of third-
19 party users who have abused RapidShare’s services in violation of their contracts with
20 RapidShare by allegedly saving infringing files onto RapidShare’s websites and distributing
21 those links to others.” (Doc. No. 6-1 at 18.) Defendants’ argument addresses the merits of
22 Plaintiff’s claims, and not RapidShare’s contacts with the forum state. In essence, Defendants
23 argue that they are not responsible for the allegedly infringing actions of their California users.
24 For purposes of determining whether RapidShare has purposefully availed itself of the forum,
25 the Court need not decide who is responsible for the alleged infringement. The relevant facts
26 with respect to purposeful availment are that RapidShare sells subscriptions to its web-based
27 services to California users and that California residents utilize RapidShare’s interactive
28 website and servers to upload and download materials. Considering the nature and quality of

1 the commercial activity that RapidShare conducts over the Internet, the Court concludes that
2 Plaintiff has met its burden of showing that RapidShare has purposefully availed itself of this
3 forum. See Cybersell, 130 F.3d at 419.

4 **2. Arising Out of Forum-Related Activities**

5 The second requirement for specific, personal jurisdiction is that the plaintiff's claims
6 arise out of the defendant's forum-related activities. Schwarzenegger, 374 F.3d at 802. The
7 Ninth Circuit has adopted a "but for" test when assessing whether an action arises out of a
8 defendant's contacts with the forum state. See, e.g., Panavision, Intern., L.P. v. Toeppen, 141
9 F.3d 1316, 1322 (9th Cir. 1998).

10 Plaintiff contends that its claims arise out of RapidShare's forum-related activities
11 because RapidShare possesses illegal copies of Plaintiff's copyrighted materials and sells
12 California subscribers access to those materials. (Doc. No. 14 at 15-16.) Defendants argue
13 that the relatedness requirement is not met because RapidShare's contacts are based on the
14 alleged activities of third-party users who abuse RapidShare's website. (Doc. No. 6-1 at 20.)
15 Defendants' argument focuses on the merits of Plaintiff's claim and not on RapidShare's
16 contacts with California. For purposes of personal jurisdiction, RapidShare's relevant contacts
17 with the forum include its use of rapidshare.com to sell (and provide without charge)
18 California residents access to RapidShare's file-hosting service which allows California
19 residents to download infringing materials. Plaintiff's claims arise out of RapidShare's forum-
20 related activities involving California users of RapidShare. Accordingly, the Court concludes
21 that Plaintiff has met its burden of showing that its lawsuit arises out of RapidShare's contacts
22 with this forum.

23 **3. Reasonableness**

24 If a plaintiff meets its burden of satisfying the first two prongs, as Plaintiff has here, the
25 burden shifts to the defendant to present a compelling case that the exercise of jurisdiction
26 would be unreasonable. Schwarzenegger, 374 F.3d at 802. In evaluating reasonableness,
27 courts must consider:

28 (1) the extent of the defendant's purposeful injection into the forum; (2) the

1 defendant's burdens from litigating in the forum; (3) the extent of conflict with
2 the sovereignty of the defendant's state; (4) the forum state's interest in
3 adjudicating the dispute; (5) the most efficient judicial resolution of the
4 controversy; (6) the importance of the forum to the plaintiff's interest in
5 convenient and effective relief; and (7) the existence of an alternative forum.

6 Ziegler v. Indian River County, 64 F.3d 470, 474-75 (9th Cir. 1995). The court should weigh
7 all seven factors, and no single factor is dispositive. Id. at 475.

8 After considering the parties' arguments, the Court concludes that Defendants have not
9 met their burden of showing that the Court's exercise of jurisdiction over RapidShare is
10 unreasonable. RapidShare has purposely availed itself of this forum by its conceded contacts
11 with California users of its service. While RapidShare is a Swiss company and its
12 representatives will have to travel to litigate in this forum, the Court concludes that this factor
13 does not render the exercise of jurisdiction unreasonable. Much of the evidence in the case
14 will be produced electronically, and many of the relevant witnesses and documents appear to
15 be located in California. California's interest in adjudicating this dispute is significant, as
16 Plaintiff is a California corporation and the state has an interest in the enforcement of its
17 residents' intellectual property rights. Considerations regarding efficient judicial resolution
18 of this controversy do not weigh in favor of dismissal. It appears that the parties, evidence, and
19 witnesses relevant for this case can be found in California, Switzerland, Germany, and
20 elsewhere. Proceeding in California will be no less efficient than proceeding in another
21 location. Plaintiff, who chose to litigate here, has a significant interest in the convenient and
22 effective relief that this forum affords, as Plaintiff is a California corporation interested in
23 stopping allegedly infringing activities occurring in California and elsewhere in the United
24 States. Finally, the existence of an alternative forum in either Switzerland or Germany does
25 not persuade the Court that the exercise of jurisdiction over Defendants would be
26 unreasonable. Accordingly, the Court concludes that Defendants have failed to present a
27 compelling case that this Court's exercise of jurisdiction would be unreasonable. See
28 Schwarzenegger, 374 F.3d at 802. The Court denies Defendants' motion to dismiss for lack

1 of personal jurisdiction as to RapidShare without prejudice.

2 **C. Personal Jurisdiction Over Schmid and Chang**

3 When considering personal jurisdiction, courts must assess each defendant's contacts
4 with the forum state individually. Calder v. Jones, 465 U.S. 783, 790 (1984). Defendants
5 argue that Schmid and Chang are not subject to this Court's jurisdiction because they, as
6 individuals, have not purposefully availed themselves of the forum. (See Doc. No. 6-1 at 12.)
7 Chang is a German citizen and a resident of Switzerland. (Chang Decl. ¶ 3.) He has never
8 lived in California or anywhere in the United States. (*Id.*) Since joining RapidShare in 2006,
9 Chang has not traveled on business to the United States. (*Id.*) Chang has no bank accounts
10 or other tangible personal or real property in the United States. (*Id.* ¶ 4.) Schmid is also a
11 German citizen and a resident of Switzerland. (Schmid Decl. ¶ 3.) He has never lived in
12 California or elsewhere in the United States, nor has he ever visited the United States. (*Id.*)
13 He has no bank accounts or other tangible personal or real property in the United States. (*Id.*
14 ¶ 4.) Both Schmid and Chang submitted declarations stating that they have never intentionally
15 encouraged RapidShare users or other third parties to infringe Plaintiff's images, and that they
16 have never personally copied or distributed any of Plaintiff's copyrighted materials. (*Id.* ¶ 7;
17 Chang Decl. ¶ 9.) Plaintiff has presented no contrary evidence regarding Schmid and Chang's
18 contacts with California or their personal involvement in the alleged infringement. Based on
19 the evidence presented, the Court concludes that Schmid and Chang have not, as individuals,
20 purposefully availed themselves of this forum.

21 Plaintiff argues that Schmid and Chang are nonetheless liable because they are the
22 moving, active, conscious force behind RapidShare's infringing activity.² (Doc. No. 14 at 20-
23 21.) "Under the fiduciary shield doctrine, a person's mere association with a corporation that
24 causes injury in the forum state is not sufficient in itself to permit that forum to assert
25

26 ²Plaintiff only appears to argue that Schmid is subject to jurisdiction because of his role
27 as a moving, active, conscious force behind the infringing activities. (See Doc. No. 14 at 20-
28 21.) The Court will address this basis for liability as to both Schmid and Chang, however,
because Plaintiff has presented no alternative theory for maintaining jurisdiction over Chang.

1 jurisdiction over the person.” Davis v. Metro Prod., Inc., 885 F.2d 515, 520 (9th Cir. 1989).
2 To find jurisdiction over Schmid and Chang based on RapidShare’s contacts with the forum
3 state, “there must be a reason for the court to disregard the corporate form.” Id. Plaintiff has
4 not presented evidence or argument sufficient to convince the Court that it is appropriate to
5 disregard RapidShare’s corporate form. Accordingly, because the Court concludes that
6 Schmid and Chang have not purposefully availed themselves of this forum, and because the
7 Court cannot assert jurisdiction over Schmid and Chang based on RapidShare’s contacts with
8 the forum, the Court grants Defendants’ motion to dismiss for lack of personal jurisdiction as
9 to Schmid and Chang without prejudice.

10 **II. Forum Non Conveniens**

11 “A defendant invoking forum non conveniens ordinarily bears a heavy burden in
12 opposing the plaintiff’s chosen forum.” Sinochem Intern. Co. Ltd. v. Malaysia Intern.
13 Shipping Corp., 549 U.S. 422, 430 (2007). The defendant “must show two things: (1) the
14 existence of an adequate alternative forum, and (2) that the balance of private and public
15 interest factors favors dismissal.” Boston Telecomms. Group, Inc. v. Wood, 588 F.3d 1201,
16 1206 (9th Cir. 2009). A plaintiff’s choice of forum should not be disturbed “unless the ‘private
17 interest’ and ‘public interest’ factors strongly favor trial in the foreign country.” Dole Foods
18 Co., Inc. v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2002). If a plaintiff is a United States citizen,
19 the defendant must satisfy a particularly heavy burden because when a plaintiff chooses its
20 home forum, it is reasonable to assume that its choice is convenient. Piper Aircraft Co. v.
21 Reyno, 454 U.S. 235, 255-56 (1981); Lueck v. Sundstrand Corp., 236 F.3d 1137, 1143 (9th
22 Cir. 2001). The Ninth Circuit has noted that

23 the standard to be applied [to a motion for dismissal on the ground of forum non
24 conveniens] is whether . . . defendants have made a clear showing of facts which
25 . . . establish such oppression and vexation of a defendant as to be out of
26 proportion to plaintiff’s convenience, which may be shown to be slight or
27 nonexistent.

28 Cheng v. Boeing Co., 708 F.2d 1406, 1410 (9th Cir. 1983). Forum non conveniens is “an

1 exceptional tool to be employed sparingly.” Ravelo Monegro v. Rosa, 211 F.3d 509, 524 (9th
2 Cir. 2000).

3 Here, the Court concludes that the balance of private and public interest factors do not
4 favor dismissal, and accordingly declines to address the adequacy of an alternative forum.

5 **A. Private Interest Factors**

6 To determine whether dismissal is appropriate, a court should consider the following
7 private interest factors:

8 (1) the residence of the parties and the witnesses; (2) the forum’s convenience
9 to the litigants; (3) access to physical evidence and other sources of proof; (4)
10 whether unwilling witnesses can be compelled to testify; (5) the cost of bringing
11 witnesses to trial; (6) the enforceability of the judgment; and (7) all other
12 practical problems that make trial of a case easy, expeditious and inexpensive.

13 Lueck, 236 F.3d at 1145 (citing Gulf Oil v. Gilbert, 330 U.S. 501, 508 (1947)). “The district
14 court should look to any or all of the above factors which are relevant to the case before it,
15 giving appropriate weight to each. It should consider them together in arriving at a balanced
16 conclusion.” Id. at 1145-46.

17 After considering the private interest factors, the Court concludes that they do not weigh
18 in favor of dismissal. The necessary parties and witnesses are located in California,
19 Switzerland, Germany, and elsewhere. While RapidShare’s representatives and some
20 witnesses will have to travel to litigate in this forum, dismissing this action in favor of a
21 European venue would mean that Plaintiff and its witnesses would have to travel the same
22 distance. The same is true of the relevant physical evidence. Plaintiff argues that tens of
23 thousands of documents relating to Plaintiff’s proof of copyright ownership are located in the
24 United States, primarily in California. (Doc. No. 15 at 11.) Defendants argue that all of their
25 relevant information and documents are located in Switzerland or Germany. (Doc. No. 7-1 at
26 22.) Enough of the physical evidence appears to be in California that this factor does not
27 weigh in favor of dismissal. Moreover, much of the evidence in this case will likely be
28 electronic and will easily be made available in this forum. Defendants contend that “a

1 European trial offers better means to compel witnesses.” (*Id.* at 25.) However, Defendants’
2 motion to dismiss does not identify any unwilling witnesses who are important for
3 RapidShare’s case and whose attendance the Court will be unable to compel. With respect to
4 cost, the Court concludes that the financial burden of bringing witnesses to this forum is not
5 so great as to weigh in favor of dismissal. Defendants argue that a judgment from this Court
6 would have to be enforced in Switzerland or Germany and that the judgment may not be fully
7 recognized if it conflicts with those nations’ public policies or laws. (*Id.* at 24.) Plaintiff
8 points out, however, that it seeks to enjoin RapidShare from “encouraging and permitting”
9 United States residents to upload and download Plaintiff’s copyrighted materials. (Doc. No.
10 15 at 16.) Accordingly, Plaintiff values the ability of this Court to enforce any judgment
11 domestically. The Court does not consider proceeding in this forum imprudent in the face of
12 the potential international enforcement difficulties cited by Defendants. Finally, the Court can
13 conceive of no other practical problems that are sufficiently substantial to warrant disrupting
14 Plaintiff’s choice of forum.

15 **B. Public Interest Factors**

16 In addition to the private interest factors, the Court must consider the following public
17 interest factors: “(1) local interest of lawsuit; (2) the court’s familiarity with governing law;
18 (3) burden on local courts and juries; (4) congestion in the court; and (5) the costs of resolving
19 a dispute unrelated to this forum.” *Lueck*, 236 F.3d at 1147 (citing *Piper Aircraft*, 454 U.S.
20 at 259-61; *Gulf Oil*, 330 U.S. at 508-09).

21 The public interest factors weigh in favor of maintenance of this suit in California. The
22 local interest in the lawsuit is substantial, as Plaintiff is a California corporation seeking to
23 ensure the protection of its intellectual property rights and to combat infringement occurring
24 in this forum. Defendants suggest that European law might apply to the controversy, and
25 Plaintiff has not adequately briefed the issue for purposes of this motion. Even assuming
26 foreign law applies, the Court concludes that this factor does not tilt the scales in favor of
27 dismissal. Considering the forum’s interest in the controversy, the Court also concludes that
28 the burden and cost of proceeding with this litigation in California are not so great as to

1 warrant dismissal.

2 Because the Court concludes that the balance of the private and public interest factors
3 do not favor dismissal, the Court denies Defendants' motion to dismiss for forum non
4 conveniens.

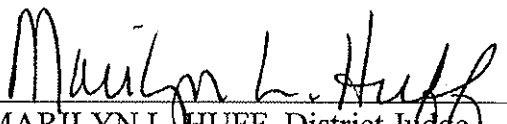
5 Defendants filed several evidentiary objections to Dr. Norman Zada's declaration in
6 opposition to Defendants' motions to dismiss. (Doc. No. 36-4.) The Court notes Defendants'
7 objections. To the extent they are valid, the Court sustains them. To the extent they are
8 invalid, the Court overrules them.

9 **CONCLUSION**

10 For the reasons set forth above, the Court denies without prejudice Defendants' motion
11 to dismiss for lack of personal jurisdiction as to RapidShare, and grants without prejudice
12 Defendants' motion to dismiss for lack of personal jurisdiction as to Schmid and Chang. The
13 Court also denies Defendants' motion to dismiss for forum non conveniens.

14 **IT IS SO ORDERED.**

15 DATED: May 12, 2010

16 
17 **MARILYN L. HUFF, District Judge**
18 **UNITED STATES DISTRICT COURT**

19 **COPIES TO:**

20 All parties of record
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